

STATE OF MICHIGAN  
COURT OF APPEALS

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MATTHEW KENNEDY,

Plaintiff-Appellant,

v

FARM BUREAU MUTUAL INSURANCE  
COMPANY OF MICHIGAN,

Defendant-Appellee.

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UNPUBLISHED

August 3, 2006

No. 268021

Monroe Circuit Court

LC No. 05-019503-NF

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

COOPER, J. (*dissenting*).

Plaintiff appeals as of right from the trial court's order granting summary disposition of plaintiff's claim for personal injury protection (PIP) benefits in favor of defendant. The majority affirms, but I must respectfully dissent because I find that, following the reasoning of *Drake v Citizens Ins Co*, 270 Mich App 22; 715 NW2d 387 (2006), the correct conclusion is that plaintiff's injury is covered by the no-fault act, MCL 500.3105.

Plaintiff was injured while attempting to tighten a valve in the hydraulic system that raised or lowered the dump box of his dump truck, rendering it functional. Plaintiff had driven the truck to a site where he was to deliver a load of hot asphalt, and was preparing to dump the asphalt when a hydraulic line blew. Plaintiff drove the truck back to his home to repair the hydraulic line. While plaintiff was tightening the valve, a fitting blew and the dump box fell, pinning plaintiff's right arm from the elbow down. Plaintiff's arm was eventually amputated. Defendant refused to pay plaintiff's claim for no-fault PIP benefits, and plaintiff filed this action.

The trial court found and the majority agrees that summary disposition is appropriate on the basis that plaintiff was not engaged in a transportation function when he was injured. *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 225-226; 580 NW2d 424 (1998). MCL 500.3105(1) requires that an injury "aris[e] out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." An injury arises out of "the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" if "the injury is closely related to the transportation function of" the motor vehicle. *McKenzie*, *supra* at 226. The Court in *McKenzie* suggested that the uses of a multi-purpose vehicle that are not specifically related to transportation were excluded: "Our precise disagreement with the

dissent lies in its proposition that when a multipurpose vehicle is used for any of its intended purposes, it is being used ‘as a motor vehicle.’” *McKenzie, supra* at 223, n9.

The majority notes that just prior to this incident, plaintiff had driven the dump truck approximately 50 miles to his home and back to the work site for the purpose of repairing the hydraulic line. The majority suggests that this demonstration of the truck’s driveability proves the truck’s transportational function cannot be at issue here. But I would find that it is the delivery aspect of the dump truck’s transportational function, rather than the driving aspect, that is operative in this plaintiff’s injury.

This Court in *Drake* found that where the multiple functions of the vehicle, in that case driving and delivery, are essentially inseparable, then the delivery function is transportational also. In *Drake* the vehicle at issue was a grain delivery truck; a clog in the auger system had stopped the process of unloading grain from the truck, and the plaintiff was injured while trying to unclog the system. *Id.* at 24. This Court found that the injury was related to the transportational function of the vehicle because “[t]he vehicle involved is a delivery truck, and it was being used as such when the injury occurred.” *Id.* at 26.

As the majority notes, *Drake* distinguished *Bialochowski v Cross Concrete Pumping Co*, 428 Mich 219; 407 NW2d 355 (1987), which our Supreme Court overruled in *McKenzie*. *Drake, supra* at 28. More importantly, the *Drake* court also found that even “under the analysis set forth in *McKenzie*,” plaintiff’s injury did “arise out of the ownership, operation, maintenance or use of a motor vehicle *as a motor vehicle*,” reasoning that “[t]his case is unlike those circumstances identified in *McKenzie* as rare instances ‘when a motor vehicle is used for other purposes, e.g., as a housing facility of sorts, as an advertising display (such as at a car dealership), as a foundation for construction equipment, as a mobile public library, or perhaps even when a car is on display in a museum.’” *Drake, supra* at \_\_\_\_ (emphasis in original).

Similarly here, the dump truck’s second purpose was not a separate purpose with utility distinct and apart from its transportational purpose. A camper truck may be parked forever and its alternate purpose, as a housing facility of sorts, may still be served indefinitely. A vehicle incapable of locomotion may serve as an advertising display, a foundation for construction equipment, or a library indefinitely as well. Logically, what the examples have in common is that the identified secondary purposes are separable in that they may be served whether the transportational function of the vehicle is operational or not; their use and value is distinct from the transportational function. A dump truck simply does not fit into this category. A dump truck moves from place to place its driver and its cargo, with an efficient system for dumping cargo in that the dump box raises and lowers at the touch of a button; if it is unable to move both cargo and driver, and deliver cargo efficiently, its utility as a dump truck is extinguished, just like the grain delivery truck in *Drake*.

The majority finds that “plaintiff was not maintaining the truck as a motor vehicle when his injury occurred because the hydraulic system was not related to the transportational purpose of the vehicle.” I disagree because I believe that since the hydraulic system enables the dumping function of the dump truck, thus allowing it to fulfill its primary purpose of delivering cargo, the hydraulic system is central to its transportational purpose. Because I would find that the two

uses of a dump truck, driving and delivery, are inextricably linked, I would find that both are transportation uses, and that plaintiff's injury was therefore incurred in the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. I would reverse.

/s/ Jessica R. Cooper